STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL

Re: *Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71

When new competitive developments begin to affect negotiations in an existing marketplace, it is not surprising if friction among players results. Change means that participants can no longer rely on the old "settled business expectations" to remain settled – and the communications marketplace of the early 21st Century is certainly nothing if not dynamic. It is against this backdrop that we launch this Notice of Proposed Rulemaking.

Congress, through the Cable Consumer Protection and Competition Act of 1992, gave the Commission a limited role in overseeing some elements of otherwise private negotiations between TV broadcasters and multichannel video programming distributors ("MVPDs") over the terms of MVPD carriage of local television signals. Now incorporated into the Communications Act, Section 325 provides us with guidance in determining whether, or if, any changes to our retransmission consent rules might be warranted. The statute explicitly directs us to act only to preserve "good faith" in the bargaining process, and does not require any particular outcome. In other words, regardless of any changes in the competitive landscape, the law does not mandate that broadcasters and MVPDs always reach a carriage deal – even though, in the vast majority of cases, agreements are reached in a quiet and timely manner. To the contrary, Section 325 states that television signals may not be carried without the "express" consent of the broadcaster. For this reason, I agree with the conclusion discussed in the Notice that the Commission lacks authority to mandate interim carriage. Similarly, the legal analysis in the Notice makes a strong case that Section 325 and the Administrative Dispute Resolution Act prevent the Commission from ordering parties in a retrans dispute into binding arbitration. The statute also plainly states that merely asking for more money does not constitute bad faith.

That said, the Act does authorize the Commission to consider adjustments to our good faith rules if the facts support revisions, and I look forward to reviewing comments on the many concepts the Notice tees up under that rubric. Moreover, Section 325 does not affect our ability to consider the continuing need for regulations that long predate the statutory retrans scheme, such as the network nonduplication and syndicated exclusivity rules. In addition, there may be other separate and distinct regulations that have some bearing on retrans negotiations today, such as tier placement. I welcome the education on these questions that I expect many commenters will be eager to provide.

Finally, I want to raise a cautionary flag for all participants in this marketplace, whether they comment in the rulemaking or not. I am somewhat concerned that the mere opening of this proceeding may disrupt – however unintentionally – the momentum behind ongoing negotiations for new or renewed retrans agreements this year. If I am able to convey only one message today on this topic, it's this: No party should assume that the Commission will act in a particular way, or at a particular time, in this docket. So those of you who are working on retrans deals in 2011 and beyond should stay seated, and engaged, at the bargaining table, and reach a deal on your own. Don't use the mere existence of this Notice as an excuse to stop negotiating and reaching deals. Please don't expect the government to resolve any disputes for you.

I thank the staffs of the Media Bureau and the Office of General Counsel for their work on the Notice.